Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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*WILLIAM PAUL RODGERS, JR.
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORELLI
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

*Counsel of Record

DATED: January 7, 1985

CASILLAS PRESS INC. • 1717 K ST NW WASHINGTON DC • 223-1220

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The National Association of Regulatory Utility Commissioners (hereinafter referred to as NARUC) hereby submits its brief as amicus curiae in support of the Jurisdictional Statement filed by the Louisiana Public Service Commission, *et al.*, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in *South Central Bell Telephone Company v. Louisiana Public Service Commission,* attached as A-1 to the Jurisdictional Statement filed herein. The NARUC files this

brief with the written consent of the Appellants and the Appellee.

INTEREST OF AMICUS CURIAE

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Louisiana Public Service Commission (hereinafter referred to as the Louisiana PSC), Appellant herein, is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating telecommunications within their respective borders. As such, these officials have the obligation to assure the establishment of telecommunications services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable.

The decision of the U.S. Court of Appeals for the Fifth Circuit which Appellant seeks to have overturned concerns a decision of the Federal Communications Commission (hereinafter FCC or Commission) which preempts the States from the exercise of authority over intrastate depreciation rate prescription. Amendment of Part 31, *Memorandum Opinion and Order,* 92 FCC2d 864 (1983) (A-57). The authority to prescribe intrastate depreciation rates is crucial to the ability of the States to discharge their statutorily-imposed duty to assure that intrastate telecom-

munications service is provided at rates and charges that are just and reasonable. The FCC's preemptive action severely infringes upon the ability of the States to discharge this duty. The NARUC therefore has an important interest in the outcome of this case which is of obvious nationwide significance.

The Fifth Circuit decision at issue here is just one in a group of cases which have arisen as a result of the FCC's intrastate depreciation preemption decision. The volume of litigation surrounding this issue illustrates the seriousness with which the States view the FCC's unlawful intrusion into their regulatory sphere. Five additional cases are currently pending before this Court.

Two of these cases concern direct challenges to the FCC's preemption decision. In *California and Public Utilities Commission of California, et al. v. FCC,* No. 84-889 (U.S. filed Dec. 12, 1984), the NARUC, along with the California PUC and fourteen other State commissions and consumer representatives, has asked this Court to issue a petition for writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit had previously issued a 2-1 decision upholding the FCC's preemptive action. *Virginia State Corporation Commission v. FCC,* 737 F.2d 388 (1984). In *Louisiana Public Service Commission v. FCC,* No. 84-871 (U.S. filed Nov. 30, 1984), the Louisiana PSC has filed a direct appeal to this Court of the same Fourth Circuit decision. Oppositions have yet to be filed in either case.

The remainder of the cases which have already reached this Court have arisen in the same way as the instant case. The involved State utility bodies have refused to recognize the validity of the FCC's preemptive action. In all but one instance, these utility commissions have had injunction

suits initiated against them by their local telephone companies in the federal district courts pursuant to 47 U.S.C. section 401(b). In the first of these cases, the Arkansas PSC has asked this Court to issue a petition for writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit which had issued a decision holding that the district court below had abused its discretion in refusing to enjoin the PSC from nonadherence to the FCC's decision. *Southwestern Bell Tel. Co. v. Arkansas PSC,* 584 F.Supp. 1087 (D. Ark.), *rev'd,* 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3290 (U.S. Oct. 16, 1984) (No. 84-483). In issuing its decision, the Eighth Circuit determined that the FCC's preemption decision constituted an enforceable "order" within the meaning of section 401(b).[1]

The Eighth Circuit's decision is in direct conflict with the decision of the First Circuit in *New England Telephone Co. v. Public Utilities Commission of Maine,* 570 F.Supp. 1558 (D. Me. 1983), *rev'd,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed,* No. 84-900 (U.S. filed Dec. 5, 1984). The First Circuit has held that the FCC's decision does not constitute an enforceable "order" within the meaning of 47 U.S.C. §401(b). The First Circuit's decision is the subject of a petition for writ of certiorari recently filed by New England Telephone. The First Circuit's decision is also in direct conflict with the decision of the Fifth Circuit at issue here.

The final case to have already reached this Court involves the decision of the Ohio PUC to refuse to recognize the FCC depreciation decision. Cincinnati Bell appealed

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[1]The NARUC, joined by eighteen State utility commissions and consumer representatives, has filed an amici curiae brief in support of the Arkansas PSC's petition.

the Ohio PUC's decision to the Ohio Supreme Court which held that the State commission was not obligated to follow the FCC's rulemaking action. Cincinnati Bell has filed an appeal with this Court seeking reversal of the Ohio Supreme Court decision. *Cincinnati Bell Telephone Co. v. Ohio Public Utilities Commission,* 12 Ohio St. 3rd 380 (1984), *appeal docketed,* 53 U.S.L.W. 3343 (U.S. Oct. 6, 1984) (No. 84-623).

At least five other cases involving the same issue are currently being litigated in the lower federal courts. *New England Telephone v. Public Service Board of Vermont,* 576 F.Supp. 490 (D. Vt. 1984), *appeal pending,* No. 84-7051 (2nd Cir. filed June 27, 1984); *Chesapeake & Potomac Telephone Co. v. Maryland Public Service Commission,* 560 F.Supp. 844 (D. Md. 1983), *aff'd,* ____ F.2d. ____ (4th Cir. Nov. 20, 1984); *Wisconsin Bell v. Public Service Commission of Wisconsin,* No. 84-C-0004 (D. Wisc. decided Nov. 13, 1984); *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa decided Sept. 27, 1984); *Pacific Northwest Bell v. Washington Utilities & Transportation Commission,* 565 F.Supp. 17 (W.D. Wash. 1983), *appeal pending,* No. 83-3746 (9th Cir. filed April 19, 1983). Some or all of these cases will also eventually be brought to this Court for decision.

The extensive litigation surrounding this issue has created a host of problems. The uncertainty which exists while a suit is pending coupled with the inequities which result from conflicting federal court determinations has created an unhealthy situation for State utility commissions, local telephone companies, consumers and federal-State relations. The NARUC respectfully submits that this Court must exercise its jurisdiction over the myriad cases involving this issue, including the instant case, to deter-

mine the proper scope of 47 U.S.C. section 401(b) and, more broadly, the legality of the FCC's depreciation preemption decision.

SUMMARY OF ARGUMENT

The Fifth Circuit was incorrect in concluding that a State public utility commission constitutes a "person" within the meaning of 47 U.S.C. section 401(b). "Person" is defined for purposes of section 401(b) in 47 U.S.C. section 153(i). "State commission" is not contained in section 153(i). It is defined instead separately in a succedent subsection. This Court must not confer authority on the federal district courts to enforce FCC decisions against State utility commissions on the strength of an expanded definition of "person" that clearly reaches beyond the language of the Communications Act.

The Fifth Circuit was also incorrect in concluding that the FCC's preemption decision constitutes an enforceable "order" within the meaning of section 401(b). The FCC's decision was the product of a rulemaking proceeding and fits the Administrative Procedure Act's definition of a "rule". 5 U.S.C. section 551(4). Only an adjudicatory order, and not a rule, may be enforced by private parties under section 401(b) as an "order". 5 U.S.C. section 551(6).

Finally, even if one assumes that section 401(b) permits the enforcement of the FCC's preemption decision against a State commission, the scope of this section was exceeded by the Fifth Circuit in upholding the district court's issuance of a dollar-specific rate injunction requiring the Louisiana PSC to adhere to a previously authorized rate of return. Section 401(b) does not permit the federal courts to review ratemaking decisions that extend beyond

the FCC's decision being enforced. Since the FCC's depreciation decision extended only to determinations concerning depreciation methodology, the action of the Fifth Circuit in upholding the district court's determination as to what a fair rate of return should be for South Central Bell was improper.

ARGUMENT

A. A State Utility Commission Does Not Constitute a "Person" Within the Meaning of Section 401(b).

Section 401(b), 47 U.S.C. section 401(b) provides as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . any party injured hereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce obedience to such order . . .

"Person" is defined for purposes of those provisions of the Communications Act regulating wire and radio communication by section 153(i) as follows:

> "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation, . . .
>
> 47 U.S.C. section 153(i).

"State commission" is not listed within this definition. In fact, "State commission" is specifically defined by Congress in a succedent subsection.

> "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.
>
> 47 U.S.C. section 153(t).

The Fifth Circuit has equated a "State commission" as defined in 47 U.S.C. section 153(t) to a "person" beyond the definition given in the preceding subsection (i). Neither the language nor the history of the Communications Act justifies this action. To include a State utility commission within the same class defined by the words "an individual, partnership, association, joint-stock company or corporation" "offends the traditional canon of statutory construction expanding the general terms beyond the specific words which follow." *New England Telephone Co. v. Public Service Board of Vermont,* 576 F.Supp. 490, 495 (D. Vt. 1984), *appeal pending,* No. 84-7051 (2nd Cir. filed June 27, 1984). Furthermore, as determined by the U.S. District Court for the District of Vermont:

> The statutory scheme offers no suggestion that the provisions of 47 U.S.C. section 401(b) was designed to make injunctive relief available against a State regulatory agency at the instance of a regulated carrrier who asserts it is aggrieved by the State ratemaking process.
>
> *Id.*

This Court must not ascribe an intent on the part of Congress to confer authority on the federal district courts to enforce rulemaking decisions of the FCC against the State utility commissions "on the strength of an expanded definition of 'person' that clearly reaches beyond the language of section 3 of the Act [47 U.S.C. section

153(i)]." *Id.* at 494. The conclusion of the Fifth Circuit must be rejected and the rationale put forth by the District Court for Vermont should be adopted by this Court.

B. The FCC's Preemption Decision Does Not Constitute an Enforceable "Order" Within the Meaning of Section 401(b).

The word "order" in section 401(b) does not include an FCC decision of the sort at issue here. The decision at issue is the product of a rulemaking proceeding, namely the amendment of Part 31 of the FCC's rules. It fits the Administrative Procedure Act's (APA) definition of a "rule". It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. section 551(4). Only an adjudicatory order, and not a rule, may be enforced by private parties under section 401(b) as an "order."

The APA defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* . . ." 5 U.S.C. section 551(6) (emphasis supplied). Although this definition applies to the APA and not necessarily to the Communications Act, which was enacted twelve years earlier, the APA was the product of extensive study of preexisting procedure. *New England Telephone Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 5 (1st Cir. 1984), *petition for cert. filed,* No. 84-900 (U.S. filed Dec. 5, 1984).

As determined by the First Circuit, whose holding is in direct conflict with the decision of the Fifth Circuit at issue here, this construction of section 401(b) is essential to preserve procedural fairness to parties. Noting that review

of the agency order for which enforcement is sought in a district court under section 401(b) is reserved to circuit courts of appeal under 28 U.S.C. section 2342(1), the First Circuit stated:

> This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding.
>
> *Id.* at 6-7.

In addition, to interpret "order" in section 401(b) broadly enough to encompass rules "threatens the sound development of a coherent nationwide communications policy — a central objective of the 1934 Act." *Id.* at 5. Rules are usually highly general in form and content. To apply a rule in a given factual situation usually involves interpretation of its scope and meaning.

> To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (an inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.
>
> *Id.* at 6.

Furthermore, 47 U.S.C. section 401(b) also requires that a party must fail or neglect to "obey an order" of the FCC before injunctive relief is available. Both common sense and federal jurisprudence dictate that to be in violation of an "order" one must have been directed to do or not to do a certain act. The cases decided pursuant to the forerunner of section 401(b), 49 U.S.C. section 16(12), required that the party sought to be enjoined must be in violation of an order or directive commanding the party to take or not take some action. *See e.g. McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *ICC v. Western N.Y. & P.R. Co.*, 82 F.192 (W.D. Pa. 1897). The FCC's preemption ruling did not direct the Louisiana PSC nor any other State commission to do anything. It merely constituted the FCC's view as to the rule of law on the depreciation issue. As such, it is not properly enforceable as an order within the meaning of section 401(b).

C. The District Court Exceeded Its Authority Under Section 401(b) by Issuing a Dollar-Specific Rate Injunction Which Overruled a Louisiana PSC Rate of Return Decision.

Even if one assumes that section 401(b) permits the enforcement of the FCC's preemption decision against a State commission, the scope of this section was exceeded by the Fifth Circuit in upholding the district court's issuance of a dollar-specific rate injunction requiring the Louisiana PSC to adhere to a previously authorized rate of return. Section 401(b) does not permit the federal courts to review ratemaking decisions that extend beyond the FCC decision being enforced. This section only allows for "the enforcement of such order."

In its preemption decision, the FCC specifically disavowed any intention to affect any more than the "single issue" of depreciation methodology. The Commission stated:

> Section 220(b) only prohibits the States from setting depreciation rates for telephone property inconsistent with those prescribed by the FCC. It does not require any particular tariff for intrastate service be accepted by the State commissions. *The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the State commission's broad discretion in setting charges for individual services.*
>
> *Amendment of Part 31,* 92 FCC2d 864, para. 30 (1983) (A-74) (Emphasis supplied).

Moreover, Counsel for the FCC expressly disclaimed any interest in a dollar-specific injunction in argument to the district court:

> THE COURT: As far as the rest of the case is concerned, you are not particularly interested in whatever specific increase, if any, is ordered into effect, insofar as the intrastate operation with South Central Bell is concerned?
>
> MR. INGLE: No, Sir; we're not interested in the specific numbers. I think we would see an appropriate order in this case as one which enjoins the Louisiana Commission – perhaps, in some rather vague sense – to issue a rate order which, whatever else it does, follows and obeys the FCC's depreciation rules . . .
>
> Record at 40-1, *South Central Bell.*

Since the scope of the FCC's preemption decision extended only to determinations concerning depreciation methodology, the action of the Fifth Circuit in upholding the district court's determination as to what a fair rate of return should be for South Central Bell was improper.

In addition, the Louisiana PSC is the body constitutionally authorized to set just and reasonable rates for regulated utilities offering intrastate services in the State of Louisiana. La. Const. Art. IV, §21. If a regulated utility is dissatisfied with an order of the Louisiana PSC it may challenge that order pursuant to La. R.S. §45:1192, 1194 and La. Const. Art. IV, §21(E). That remedy is complete and efficient.

The authority of the State public utility commissions to regulate intrastate rates and charges for regulated utilities is recognized by Congress in Section 152(b) of the Communications Act, 47 U.S.C. section 152(b).

> (b) . . . nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier . . .

The decision of the Fifth Circuit approving the raising of intrastate rates in the amount of $40,506,000 was an exercise of jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." As such, it was clearly prohibited by the Communications Act.

CONCLUSION

For all of the foregoing reasons, the Court should give the three issues raised by Appellant plenary consideration.

Respectfully submitted,

*WILLIAM PAUL RODGERS, JR.
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORELLI
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

*Counsel of Record

DATED: January 7, 1985